

1
2
3
4
5
6
7
8
9
10
11
12
13

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

7 || JOSE LUIS MORALES,

Plaintiff,

No. C 09-3312 PJH (PR)

9 | vs.

10 K. CRUSE and CALIFORNIA
11 DEPARTMENT OF CORRECTIONS
AND REHABILITATION.

ORDER DENYING PETITIONER'S MOTION TO ALTER OR AMEND JUDGMENT

Defendants

14 This is a civil rights case filed pro se by a state prisoner. The court granted
15 defendants' motion to dismiss the case as moot. Plaintiff has filed a motion to alter or
16 amend the judgment.

17 A motion for reconsideration under Rule 59(e) "should not be granted, absent highly
18 unusual circumstances, unless the district court is presented with newly discovered
19 evidence, committed clear error, or if there is an intervening change in the law." *McDowell*
20 *v. Calderon*, 197 F.3d 1253, 1255 (9th Cir. 1999) (citation omitted) (en banc). A district
21 court does not commit clear error warranting reconsideration when the question before it is
22 a debatable one. *Id.* at 1256. Motions for reconsideration should not be frequently made
23 or freely granted; they are not a substitute for appeal or a means of attacking some
24 perceived error of the court. *Twentieth Century - Fox Film Corp. v. Dunnahoo*, 637 F.2d
25 1338, 1341 (9th Cir. 1981).

26 Plaintiff's claim was that his constitutional rights were violated by his placement in
27 what is called the "Behavior Management Unit," or "BMU." He requested only injunctive
28 relief. In the order granting the motion to dismiss, the court granted defendants' motion to

United States District Court
For the Northern District of California

1 take judicial notice of official records showing that plaintiff had been released from the BMU
2 program and that the program had been discontinued at Pelican Bay. In granting the
3 motion the court said that "the motion is unopposed, and plaintiff concedes in his opposition
4 to the motion to dismiss that he has been released and the program discontinued."

5 One ground for the motion to reconsider now before the court is plaintiff's contention
6 that as a pro se litigant he did not know that he had to separately oppose the motion for
7 judicial notice; he believed he "could address it within the opposition to the motion to
8 dismiss, which he did." Contrary to this assertion, the opposition did not contain any
9 grounds for not taking judicial notice of the records. Furthermore, as the court's reference
10 in the ruling to plaintiff's concession in his opposition that he had been released shows, the
11 court considered the contents of the opposition. This ground for reconsideration is
12 meritless.

13 Plaintiff also contends that his placement in the BMU program is capable of
14 repetition because when the program was in operation, transferees to the prison were
15 placed in it for sixty days. See *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1509
16 (9th Cir. 1994) (exception to the mootness doctrine exists where a claim is "capable of
17 repetition yet evading review."). This fact was not raised in opposition to the motion to
18 dismiss, and plaintiff has not established that it is new evidence that could not have been
19 provided at the time of ruling. Furthermore, the mere fact that new arrivals at Pelican Bay
20 were placed in the BMU program does not establish a reasonable expectation that plaintiff,
21 who after all is already at Pelican Bay, will be subjected to the same action again. See
22 *Porter v. Jones*, 319 F.3d 483, 489-90 (9th Cir. 2003) ("reasonable expectation" standard).

23 The motion to alter or amend the judgment (document 21 on the docket) is **DENIED**.

24 **IT IS SO ORDERED.**

25 Dated: September 13, 2011.



26 PHYLLIS J. HAMILTON
27 United States District Judge